

The *amici* collectively represent the interests of virtually all institutions of higher education, particularly independent colleges and universities that are most directly affected by the National Labor Relations Act. ACE represents 1,800 accredited, degree-granting colleges and universities and higher education-related associations, organizations, and corporations.

Founded in 1918, ACE serves as the nation's unifying voice for higher education. ACE serves as a consensus leader on key higher education issues and seeks to influence public policy through advocacy, research, and program initiatives.

NAICU serves as the unified national voice of private, nonprofit higher education in the United States. Founded in 1976, NAICU currently has nearly 1,000 members nationwide, including traditional liberal arts colleges, major research universities, special service educational institutions, and schools of law, medicine, engineering, business, and other professions. The association represents these institutions on policy issues primarily with the federal government, such as those affecting student aid, taxation, and government regulation.

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AICUP is the only statewide organization that serves exclusively the interests of private higher education within the Commonwealth of Pennsylvania. AICUP provides its 83-member private colleges and universities with services and programs tailored specifically to the needs and situation of independent higher education.

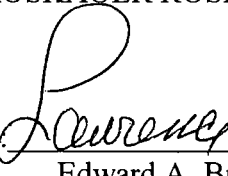
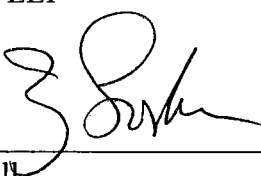
The *amici* are concerned that the Regional Director's Supplemental Decision on Remand again misapplies the standard outlined in *N.L.R.B. v. Yeshiva University*, 444 U.S. 672 (1980), and its progeny for identifying and excluding faculty serving in a managerial capacity from the scope of the National Labor Relations Act ("NLRA"). Previously, the *amici* submitted a brief and participated in oral argument in support of the Respondent-Employer on its appeal to the

United States Court of Appeals for the District of Columbia Circuit and on remand from both the Court and from the NLRB to the Regional Director of Region Six. The *amici* would again like to offer their collective experience with institutions of higher education and the realities of academic governance by faculty and administrators. The *amici's* perspective on the issues involved can assist the Board in responding to the Court of Appeals' mandate to identify which of the *Yeshiva* factors are "significant and which less so, and why" and why the Regional Director's Supplemental Decision on Remand fails to comply with and properly address the Court's specific mandate.

Thus, the *amici* respectfully request that they be granted the opportunity to submit a statement of position to the Board in support of the Respondent-Employer's Request for Review in order to represent the interests of institutions of higher education with regard to this issue. The Regional Director has consented to the *amici curiae's* requested appearance. The Charging Party-Petitioner has declined to consent.

Dated: New York, New York
August 24, 2007

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AFFIRMATION OF SERVICE

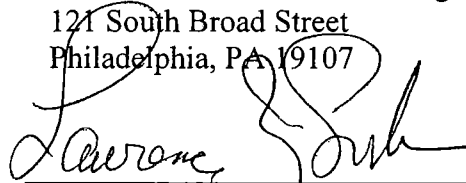
I, LAWRENCE Z. LORBER, ESQ., do hereby affirm that on the 24th day of August 2007, caused copies of the attached Motion to Participate as *Amici Curiae* in Case Nos. 6-CA-34243 and 6-RC-12276 to be served upon Region 6, Regional Director, Gerald Kobell, the Newspaper Guild of Pittsburgh/Communications Workers of America, Joseph J. Pass, Esq., and Richard H. Markowitz, Esq. by causing copies thereof to be served by UPS Overnight pursuant to the Board's Rules & Regulations on the following:

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Dated: August 24, 2007

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POINT PARK UNIVERSITY, :

Respondent - :

Employer, :

-and- :

Case Nos. 6-CA-34243

6-RC-12276

NEWSPAPER GUILD OF PITTSBURGH / :

COMMUNICATIONS WORKERS OF :

AMERICA, LOCAL 38061, :

Charging Party -

Petitioner.

----- X

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THE *AMICI CURIAE*

The American Council on Education (“ACE”), the National Association of Independent Colleges and Universities (“NAICU”), the Council of Independent Colleges (“CIC”) and the Association of Independent Colleges and Universities of Pennsylvania (“AICUP”) collectively represent virtually all institutions of higher education, particularly independent colleges and universities which are most directly affected by the National Labor Relations Act. The *amici* respectfully submit this statement of position in support of the Request for Review of Respondent/Employer Point Park University. The Regional Director has consented to the *amici curiae*’s requested appearance. The Charging Party-Petitioner has declined to consent.

ACE represents 1,800 accredited, degree-granting colleges and universities and higher education-related associations, organizations, and corporations. Founded in 1918, ACE serves as the nation’s unifying voice for higher education. ACE serves as a consensus leader on key higher education issues and seeks to influence public policy through advocacy, research, and program initiatives.

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SUMMARY OF ARGUMENT

Twenty-seven years ago, in *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980), the Supreme Court set forth a standard for identifying and excluding faculty serving in a managerial capacity from the scope of the National Labor Relations Act (“NLRA”). Subsequent Board decisions offered guidance to institutions of higher education and their faculties on the application of the Supreme Court’s decision and the plethora of factors appropriate to an analysis of managerial status. These decisions reflect a hierarchy of academic factors relevant to managerial status: (i) faculty authority over the curriculum and course offerings is paramount among the factors relevant to managerial status; (ii) authority relating to course scheduling, grading, graduation, student admission and retention policies, matriculation standards, and teaching methods are important, but not determinative; and (iii) authority regarding such other factors as tuition or faculty hiring and tenure are of lesser significance.

Although this hierarchy can be gleaned from the Board’s earlier decisions, the Board has never expressly enunciated the relative import of the *Yeshiva* factors. This case is returning to the Board upon remand from the Court of Appeals because the Court held that, in finding the Point Park faculty were employees, the Regional Director failed to “explain which

factors he found significant and which less so, and why.” While the Regional Director purported in his Supplemental Decision to categorize the factors on which he relied, he still failed to explain why he found certain factors more significant and others less so, and his categories did not accurately reflect prior Board decisions or an understanding of academic governance. The Regional Director’s entire analysis, moreover, still appears to have been inappropriately colored by the faculty’s limited role in Point Park’s structural transition from college to university status – a quintessentially administrative responsibility that typically affects the long-range plan and outlook of the institution, but not the curriculum, course offerings and other matters within the sphere of faculty authority.

Consistent with the Court’s directive, and to provide guidance to institutions of higher education and their faculties, the *amici* urge the Board to grant review in this case and expressly pronounce the relative import of the factors identified in *Yeshiva* as relevant to the issue of managerial status. Based on their understanding of the facts as presented by Point Park University, the *amici* believe that, when properly applied, these factors mandate that the faculty at Point Park are managers and thereby excluded from the National Labor Relations Act.

**ARGUMENT:
THE BOARD SHOULD GRANT REVIEW AND CLEARLY ENUNCIATE
THE RELATIVE IMPORT OF THE FACTORS THAT SHOULD BE
CONSIDERED IN DETERMINING MANAGERIAL STATUS UNDER YESHIVA.**

In *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980), the Supreme Court identified a host of factors that are relevant to the analysis of managerial status. In his Supplemental Decision on Remand, the Regional Director again failed, despite the Court of Appeals’ mandate, to adequately explain which *Yeshiva* factors he “found significant, which less so, and why.” *Point Park Univ. v. NLRB*, 457 F.3d 42, 46 (D.C. Cir. 2006). In addition to this failure to

comply with the Court's directive, the Regional Director still appeared to focus on isolated exceptions to the faculty's managerial authority. While the Regional Director expanded his factual findings in certain areas, he frequently highlighted the administration's or the board of trustees' *potential* authority to overrule faculty decisions, rather than the actual evidence that such authority is rarely if ever exercised. Such an approach is contrary to the holding and analysis in *Yeshiva* and inconsistent with many of the Board's earlier post-*Yeshiva* decisions.

In *LeMoyne-Owen College*, 345 N.L.R.B. No. 93 (Sept. 30, 2005) (*LeMoyne-Owen II*), upon remand from the Court of Appeals for similar deficiencies in the Regional Director's analysis, the Board began to clarify the proper focus of inquiry with respect to the managerial status of faculty. The Board rejected the Regional Director's reliance on the fact "that the faculty do not possess absolute control over any facet of the school's operations," and reiterated the appropriate standard of effective recommendation. Applying that standard, the Board identified a variety of the *Yeshiva* factors (beginning with curriculum) that supported a finding of managerial control. The Board did not, however, make any explicit pronouncements as to the relative importance of the *Yeshiva* factors. The Board simply observed that a "mechanical application of *Yeshiva*, i.e., counting and comparing the number of areas in which faculty have input with the number of such areas in *Yeshiva*" is inappropriate because it "fails to measure the 'extent of [the] . . . influence . . . that render[s] each academic body unique.'" *Id.* at *26.

The *amici curiae* agree with the Board that all of the *Yeshiva* factors should not be given equal weight, nor must all be present in each case as a predicate to a finding of managerial control. While the Regional Director in his Supplemental Decision placed the *Yeshiva* factors into three categories in order of importance (RD at 8-9), he failed entirely to offer any

explanation for his groupings. This cursory approach falls far short of what the Court of Appeals said was required.

More recently, in *Carroll College, Inc.*, 350 N.L.R.B. No. 30 (July 20, 2007), the Board again failed to provide the necessary explanation demanded here by the Court of Appeals when it affirmed the Acting Regional Director's determination that the faculty was not managerial. The Board noted the Acting Regional Director's statements that, in determining whether the College's faculty exercise managerial authority, the "controlling issue ... is whether the [faculty-dominated] committees effectively recommend or determine academic policy or action," and that control over "nonacademic areas" such as "hiring, tenure and promotion, budget matters, staffing levels, terms of employment, and structural changes" "is less significant in ascertaining managerial status." *Id.* at *2 (internal quotations omitted). These statements, however, say little more than what the Supreme Court held in *Yeshiva*, and fail to distinguish in any way among the factors considered.

We therefore respectfully urge the Board to clarify, for its Regional Directors, the parties in the instant matter, and institutions of higher education and their faculty more generally, the basic parameters as to which of the *Yeshiva* factors are of paramount importance, which less so, and how to balance those various considerations.

POINT I

YESHIVA REQUIRES A HOLISTIC VIEW OF UNIVERSITY GOVERNANCE, FOCUSED ON FACULTY AUTHORITY WITH RESPECT TO ACADEMIC MATTERS.

Sensitive to the uniqueness of academia, the Supreme Court recognized in *Yeshiva* that in the university context, managerial authority is more shared and less of a hierarchical pyramid than in the more typical industrial model. *Yeshiva*, 444 U.S. at 680. This distinction precludes a rote application of the Board's managerial standards as developed in the

industrial context, but it does not permit the Board or its Regional Directors to impose stricter standards and require an absolute delegation of authority as a condition to finding that faculty act in a managerial capacity. *See LeMoyne-Owen II*, 345 N.L.R.B. No. 93, at *6 (Sept. 30, 2005) (holding that “[a]bsolute’ control need not be demonstrated” for a finding that faculty are managers), *citing Lewis & Clark Coll.*, 300 N.L.R.B. 155, 163 n.41 (1990).

At Yeshiva, it was the central administration (comprised of the President, four Vice Presidents and an Executive Council of deans and administrators), and not the faculty, that set general guidelines dealing with teaching loads, salary scales, tenure, sabbaticals, retirement and fringe benefits, and developed the budget, subject to the approval of the Board of Trustees. *Id.* at 675-76. The faculty also did not have direct access to the President or even the Vice Presidents. Rather, the five undergraduate and eight graduate schools at the university were largely autonomous entities, headed by a Dean or Director, and it was principally within these decentralized structures that the faculty exercised their managerial authority – meeting formally or informally (depending on the school) to discuss and decide such academic matters as curriculum, the grading system, admission and matriculation standards, academic calendars and course schedules. *Id.* at 676. The faculty at each school also made recommendations to the Dean or Director with regard to faculty hiring, tenure, sabbaticals, termination and promotion and, in most cases, the faculties’ recommendations were implemented. *Id.*

The faculty at Yeshiva thus played a central, but by no means exclusive, role in managing the educational institution. The faculty’s authority was more circumscribed when the university faced fiscal concerns in the early 1970’s, and the faculty’s recommendations on personnel decisions were subject to budgetary constraints imposed by the administration. *Id.* While the union cited these limitations as evidence that the faculty were employees and lacked

managerial authority, the Supreme Court unhesitatingly rejected this argument. The Court explained:

the fact that the administration holds a rarely exercised veto power does not diminish the faculty's effective power in policymaking and implementation. See nn. 4, 5, *supra*. The statutory definition of “supervisor” expressly contemplates that those employees who “effectively . . . recommend” the enumerated actions are to be excluded as supervisory. 29 U.S.C. § 152 (11). Consistent with the concern for divided loyalty, the relevant consideration is effective recommendation or control rather than final authority. That rationale applies with equal force to the managerial exclusion.

Id. at 684 n.17.

The Court went on to highlight certain indicia that were central to its finding of managerial control. The Court observed that the faculty’s effective recommendation of policies in academic matters was of primary concern, and these included: curriculum and course schedules (“what courses will be offered, when they will be scheduled, and to whom they will be taught”), “teaching methods, grading policies, and matriculation standards,” “which students will be admitted, retained, and graduated,” “the size of the student body, the tuition to be charged, and the location of a school.” *Id.* at 686. The Court also noted that at Yeshiva, the faculty played a predominant role in hiring, tenure, sabbaticals, termination and promotion, but it did not rely on those “non-academic” factors as a basis for its decision.¹ *Id.* at 686 n.5.

Thus *Yeshiva* counsels that managerial authority is not to be reviewed in absolutist terms. Rather, there are many facets of university governance to be considered, particularly academic concerns, and the emphasis should be on “effective recommendation.” It

¹ The Supreme Court and subsequent Board decisions have used the term “non-academic” to refer to personnel-type decisions such as faculty hiring, tenure, sabbaticals, termination and promotion; the *amici curiae* accept that terminology, while noting that many of these decisions also have important academic significance.

is irrelevant whether the faculty's decisions are potentially subject to veto by administrators or the trustees or whether in exceptional circumstances the faculty's input was rejected or ignored.

POINT II

PRIOR BOARD DECISIONS HIGHLIGHT THE RELATIVE IMPORTANCE OF THE YESHIVA FACTORS.

Following *Yeshiva*, the Board has reviewed numerous claims of employee status at colleges and universities throughout the country. Those decisions highlight that certain factors are most determinative on the issue of managerial status. Thus, the Board has never held that faculty members were managers where it found that they did not effectively recommend policies with respect to the curriculum and course offerings. *See, e.g., Carroll Coll., Inc.*, 350 N.L.R.B. No. 30 (July 20, 2007); *LeMoyne-Owen II*, 345 N.L.R.B. No. 93 (Sept. 30, 2005); *Lewis & Clark Coll.*, 300 N.L.R.B. 155, 161-63 (1990); *Elmira Coll.*, 309 N.L.R.B. 842, 844 (1992); *Univ. of Dubuque*, 289 N.L.R.B. 349, 350, 352 (1988); *Livingstone Coll.*, 286 N.L.R.B. 1308, 1310-11, 1313 (1987); *Am. Int'l Coll.*, 282 N.L.R.B. 189, 190, 201 (1986); *Univ. of New Haven*, 267 N.L.R.B. 939, 941 (1983). Further highlighting the import of these criteria, in all but two of the cases in which the Board held the faculty lacked managerial authority, it also found that the faculty's authority with respect to the curriculum and course offerings was severely circumscribed. *Compare Univ. of Great Falls*, 325 N.L.R.B. 83, 95-96 (1997) (finding no managerial authority despite faculty's effective recommendation of curriculum over a two-year period; further details as to nature and number of recommendations were lacking); *Loretto Heights Coll.*, 264 N.L.R.B. 1107 (1982), *enforced sub nom. Loretto Heights Coll. v. NLRB*, 742 F.2d 1245, 1251 (10th Cir. 1984) (finding no managerial authority where faculty control of curriculum and course offerings is limited to their own disciplines or program areas).

The Board's findings with respect to this factor are consistent with the *amici's* own experience and understanding of university governance. Nearly forty years ago, ACE, the American Association of University Professors and the Association of Governing Boards of Universities and Colleges prepared a joint statement, reflecting the principles of shared responsibility and cooperative action in the context of academic governance. Statement on Government of Colleges & Universities, (1966) ("Joint Statement"). Among the principles outlined in the Joint Statement is the agreement that the "faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction." Joint Statement, Art. V. Curriculum development and course selection, within the framework of the institution as a whole, are the types of core academic decisions to which the skills, training and expertise of the faculty are uniquely suited, and institutions of higher education will typically vest their faculty with virtually complete authority in these areas.

Under the Board's decisions, and in practice, other academic factors, such as course scheduling, grading, graduation policies, student admission and retention policies, matriculation standards and teaching methods, are important, but not determinative, indicia of managerial status.² In each of the cases in which the Board found managerial status, the faculty was found to effectively recommend policies with respect to at least four of these seven factors. *See, e.g., LeMoyne-Owen II*, 345 N.L.R.B. No. 93 (faculty determine or effectively recommend grading, graduation standards, academic retention policies, teaching methods and selection of textbooks, and academic honors); *Lewis & Clark*, 300 N.L.R.B. at 161 (faculty made effective recommendations with regard to student admission and retention policies, matriculation standards, graduation policies, grading and teaching methods); *Dubuque*, 289 N.L.R.B. at 350,

² The Board noted in *Univ. of Dubuque*, for example, that the lack of controlling authority with respect to grading policies does not, in itself, preclude a finding of managerial status. 289 N.L.R.B. at 353.

352-53 (faculty made effective recommendations with respect to course schedules, teaching methods, graduation policies, grading and student admission and retention policies); *Am. Int'l*, 282 N.L.R.B. at 195-96, 201 (faculty made effective recommendations with respect to course schedules, matriculation standards, graduation policies, grading and student admission policies but not individual student admissions).

Variation among institutions with respect to faculty authority in these areas is, again, consistent with our experience. The uniqueness of each academic institution, historical differences in approach to governance, and market considerations will necessarily affect whether, and to what extent, these seven factors are within faculty control. *See Joint Statement*, Art. V (“[b]udget, manpower limitations, the time element, and the policies of other groups, bodies and agencies having jurisdiction over the institution may set limits to realizations of faculty advice.”) For example, faculty will most frequently be involved in setting student admission and retention policies in highly selective schools, while there will be little need for faculty input at schools that have open enrollment. Course scheduling also will generally fall within faculty control, but administrative concerns with optimizing classroom space or complying with accrediting standards may affect scheduling.

The three remaining academic factors cited by the Supreme Court in *Yeshiva* – size of student body, tuition and location of school – were of lesser import in that case, and are mentioned infrequently as factors in subsequent decisions. *See id.*, 444 U.S. at 686. Although designated by the Supreme Court as “academic,” these factors are largely determined by economic considerations, which traditionally are the concern of the president and the trustees, rather than the faculty.

Finally, post-*Yeshiva* decisions have, at times, noted such academic considerations as setting the academic calendar, *see, e.g., Boston Univ.*, 281 N.L.R.B. 798 (1986), *aff'd, review denied, Boston Univ. Chapter, Am. Ass'n of Univ. Professors v. NLRB*, 835 F.2d 399, 401 (1st Cir. 1987), the acceptance of transfer credits, *Elmira*, 309 N.L.R.B. at 844, student absence policies, *Livingstone*, 286 N.L.R.B. at 1311, course enrollment levels, *Lewis & Clark*, 300 N.L.R.B. at 161, and student advising, *Am. Int'l*, 282 N.L.R.B. at 191, as indicative of managerial authority. The absence of any of these factors in *Yeshiva* precludes granting them controlling weight and they have not, in fact, been determinative in the Board decisions considering managerial authority.

Variability with respect to these factors is again consistent with the varying philosophies, traditions and economic considerations among institutions of higher education. At some institutions for example, faculty will have primary responsibility for student advising, while other institutions view this task as an administrative function and have independent counseling centers or designated advisors to assist with this responsibility. Faculty will frequently have input into course enrollment levels and some discretion as to whether to admit students into their class, but concerns with classroom assignments, average class size, accrediting standards and the like may necessitate administrative caps on enrollment levels. Similarly, acceptance of transfer credits has economic implications because students receive the benefit of a degree without having paid the degree-granting institution for a full academic program. It is thus appropriate for the Board to consider these factors in assessing managerial authority, but not to predicate its determination on their existence or absence.

While of lesser import, Board decisions following *Yeshiva* have recognized that faculty control with respect to certain non-academic decisions is also relevant to managerial

status. Foremost among these are decisions pertaining to faculty hiring, tenure, and promotions. In virtually every case in which faculty were found to have managerial status, they also were found to make effective recommendations with respect to these factors.³ See, e.g., *Lewis & Clark*, 300 N.L.R.B. at 158 n.30; *Univ. of Dubuque*, 289 N.L.R.B. at 351-52; *Am. Int'l*, 282 N.L.R.B. at 199, 201.

Similarly, in the Joint Statement, Art. V, faculty are recognized as having primary responsibility with respect to matters of “faculty status,” including “appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal.” These decisions require consideration of scholarship, service and citizenship that faculty are uniquely qualified to assess.

The Board’s decisions and the practice within the academic community point to three distinct levels of inquiry: First, faculty authority in matters of curriculum and course selection is, for all practical purposes, a *sine qua non* of managerial status. Second, graduation policies, course scheduling, grading, student admission and retention policies, matriculation standards and teaching methods are also important and relevant considerations, and faculty should ordinarily have authority in a majority of these areas to be considered management. Third, other considerations, ranging from the academic calendar and course enrollment levels to faculty status matters, remain relevant considerations but were not central to the Supreme Court’s holding in *Yeshiva* and should not be determinative.

³ Other non-academic factors, such as selecting administrators, terminations and sabbaticals and leaves, were cited less frequently as indicia of managerial control. See, e.g., *Lewis & Clark*, 300 N.L.R.B. at 158, n.30 (faculty had managerial authority with respect to terminations and sabbaticals and leaves).

POINT III

THE REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION FAILS TO COMPLY WITH THE COURT'S DIRECTIVE TO EXPLAIN THE RELATIVE IMPORTANCE OF THE *YESHIVA* FACTORS.

In this case, the Regional Director did not properly distinguish among the *Yeshiva* factors and again failed to heed the Court's directive to adequately explain which were more important, which less so, and why. The Regional Director divided his analysis among three categories. He considered "Curriculum and Other Academic Matters," including "the extent of the faculty's ability to determine what undergraduate and graduate programs are offered, as well as changes to degree programs, including structural changes and all other changes in course offerings having effects beyond the academic department, grading, teaching methods, and admissions, retention and graduation of students to be the most significant factors relating to the determination" (RD at 8-9). Within this first tier, however, the Regional Director considered certain factors that do not appear to fit within his description, such as "Syllabi," and "Teaching Loads."⁴ The Regional Director next analyzed "Authority as to Academic-Related Matters," including "enrollment levels, the setting of tuition, course scheduling, and academic calendars" (RD at 9). Finally, the Regional Director considered "Authority Regarding Faculty Hiring, Sabbaticals, Tenure and Promotions, and Personnel Policies" to be "nonacademic areas" that are "least significant ... in determining managerial status" (RD at 9). Aside from his cursory statements that academic factors are "the most significant" (RD at 9), and that nonacademic factors "are the least significant" (RD at 36), however, the Regional Director did not provide the clarification required by the Court's remand and sought herein by the *amici curiae*.

⁴ The Regional Director analyzed the following categories in this first tier: "University Status," "Program Offerings," "Academic Policies," "Discontinuance of Programs," "Admissions," "Grading," "Syllabi," and "Teaching Loads" (RD at 9-32).

The Regional Director also offered no explanation as to why he placed certain factors within each of the above categories, nor did he explain the relative weight of such factors. This deficiency is most glaring with respect to the Regional Director's elevation of "University Status" to the foreground of his analysis. *See* Point IV, *infra*. Furthermore, the Regional Director inexplicably treated "Discontinuance of Programs" (RD at 23) separately from his discussion of "Program Offerings," and analyzed "Course Schedules" among the second tier of "Academic-Related Matters" (RD at 33) despite clear precedent to the contrary. *See Yeshiva*, 444 U.S. at 686. The Regional Director also did not explain why he considers syllabi and teaching loads to be two of the most significant factors in the analysis.

The *amici curiae* find it particularly significant that in the critical area of control over curriculum, the Regional Director again based his findings principally on changes in the structure of a few departments and programs, even though the course offerings remained virtually unchanged.⁵ He also ignored the abundant evidence of faculty control of curricular revisions by improperly focusing on who had initially proposed those revisions. *See Lemoyne-Owen II*, 345 N.L.R.B. No. 93 at 32 n.18; *Lewis & Clark*, 300 N.L.R.B. at 158, 161; *Dubuque*, 289 N.L.R.B. at 352; *see also Yeshiva*, 444 U.S. at 682 (managerial employees are those who "formulate and effectuate management policies by *expressing and making operative the decision of their employer*") (emphasis added). As the Supreme Court has explained, the fact that the faculty's authority in certain areas may be circumscribed by fiscal or other long-range policy concerns "does not diminish the faculty's effective power in policymaking and implementation."

⁵ For example, the Regional Director focused on such structural decisions as the dismantling of the Government and International Studies (GIS) Department (RD at 14); the merger of the International MBA and MBA programs (RD at 14-15); the opening of the Innocence Institute of Western Pennsylvania (RD at 15-16); and the substitution of Berlitz/ELS, Inc. classes for the University's English as a Second Language (ESL) courses (RD at 16).

Yeshiva, 444 U.S. at 684 n.17, n.27 (holding a university administration may legitimately consider, and even reject, faculty proposals in the context of concerns with scarce resources and university-wide balance); *Lewis & Clark*, 300 N.L.R.B. at 161-62, 163 n. 33 (holding that managerial status is not defeated by the lack of faculty input into broad, institutional decisions such as the creation or elimination of departments or programs, or by consideration of the financial implications of academic decisions); *Elmira*, 309 N.L.R.B. at 845, 850 (concluding the president's creation of a new core curriculum for all students without approval of the faculty or the rejection of a faculty recommendation to eliminate a general degree requirement did not alter the status of the faculty).

As noted above, furthermore, the Regional Director improperly treated "Discontinuance of Programs" separately from "Program Offerings." By doing so, he minimized the significance of his finding that Point Park faculty did exercise effective control over the discontinuance of programs (RD at 23). It is reasonably likely that the Regional Director would have reached a different outcome and found the faculty at Point Park had requisite authority over curriculum and course offerings had he viewed these areas as a single integrated factor rather than artificially separating his analysis.

The Regional Director also disregarded, without adequate justification, the important conclusion of the Middle States Report (the "Report"), reflecting an evaluation by the independent accrediting authority that the Point Park "faculty have substantial input and control over curriculum and input into academic policy-making" (RD at 52-55). While the Regional Director found that other portions of the Report demonstrated "differing impressions of the faculty's input and authority," none of the portions of the Report cited by the Regional Director detract from this central finding. As is typical in such evaluations, the Report noted various

areas that could be strengthened, such as improving communications among administrative units, department chairs and faculty, and establishing a cross-departmental faculty committee or coordinating unit with respect to the undergraduate general education core curriculum. The Regional Director cited nothing in the Report, however, that suggested that the faculty did not have “substantial input and control over curriculum.”⁶

The Regional Director’s dismissal of the conclusions contained in the Report as to faculty authority over curriculum and academic policies is contrary to Board precedent, which has recognized the significance of such independent assessments. *See Elmira Coll.*, 309 N.L.R.B. 842, 850 (1992) (“of great significance is the recent statement by an outside party, the Middle States Commission on Higher Education, commending the College on the ‘participatory processes now in place,’ to insure faculty participation in governance”); *Univ. of New Haven*, 267 N.L.R.B. 939, 939 n.1 (1983) (reversing the Administrative Law Judge’s rejection of an accreditation report because “the Board traditionally has found such accreditation reports relevant, and has relied on them in reaching its decisions”); *Bradford Coll.*, 261 N.L.R.B. 565, 566 (1982) (citing an accreditation body’s study as support for a finding of non-managerial status).

Finally, the Board made clear in *Dubuque* that a finding of managerial status is not limited to “only institutions with faculties having as much or nearly as much input as the Yeshiva faculty. In fact, the implication is quite the opposite.” 289 N.L.R.B. at 353. Thus, the absence of a precise match between all the factors evidencing managerial control in a particular

⁶ The only direct discussion of curriculum in the Report cited by the Regional Director is the observation that “revisions to majors must be submitted for further consideration to the curriculum committee of the faculty assembly and simultaneously for the Vice President of Academic Affairs.” This statement does not contradict the Report’s conclusion that the faculty has substantial control over curriculum. The faculty and a committee comprised of its members still effectively recommend the revisions at issue, regardless of whether the revisions must also be submitted to the VPAA.

Board decision and those present at Point Park is not required to support a finding of managerial status.

POINT IV

THE BOARD SHOULD CLARIFY THAT STRUCTURAL CHANGES WITHOUT FACULTY INPUT DO NOT AFFECT MANAGERIAL STATUS.

This case also presents the important issue of whether the lack of significant faculty involvement in overall structural changes to an institution of higher education (here primarily stemming from the decision to seek university status) defeats other indicia of managerial status under *Yeshiva*. The Regional Director addressed “University Status” as the very first factor in his analysis, within the first and most important section, “Curriculum and Other Academic Matters” (RD at 9). This treatment of the change to university status as a significant factor in academic governance is incorrect both as a practical matter and as a matter of Board precedent.

As a practical matter, structural change is inevitable as schools seek to maintain their competitive edge and enhance their standing in the academic community. Many structural innovations, however, have little effect on the core of teaching and learning at a college or university.

The transition from college to university status in particular may simply represent a change in name, with limited import to the academic facets of the institution. Such a change in designation can be made without ever establishing a graduate school or offering different or additional degree programs. *See, e.g.,* Kit Lively, *Why Colleges Want to Be Called Universities*,” CHRONICLE OF HIGHER EDUC. (June 13, 1997). Under the Carnegie Foundation’s Classification System, which is the most widely recognized system for classifying institutions of

higher education, there is no clear distinction between institutions denominated as “colleges” and those entitled “universities.”

It is well-recognized in the academic community that structural changes are typically within the unique province of the trustees and the administration, although institutions are encouraged to consult and collaborate with the faculty and other institutional stakeholders in implementing such changes. *See* AGB Statement of Institutional Governance, at 4 (Nov. 8, 1998). While the trustees and administration concern themselves with university structure and long-range planning, it is the faculty that “has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process.” Joint Statement, Art. V. This is the model of shared governance that has long distinguished colleges and universities from the typical industrial model of a hierarchical management pyramid. *See Yeshiva*, 444 U.S. at 680.

Recognizing this unique governing structure, in *Lewis & Clark* the Board explained that policy considerations pertaining to an academic institution’s financial viability and long-range planning “are much broader than those that the faculty members consider in their academic decision-making. The faculty’s lack of control over these particular decisions does not nullify the faculty’s extensive authority over academic matters.” 300 N.L.R.B. at 161-62. In *Lewis & Clark* the Board therefore reversed the Regional Director’s finding that the creation of “umbrella committees” outside the formal committee structure and with only minority faculty representation had negated the faculty’s managerial authority under the *Yeshiva* factors. *Id.* at 161. Even though proposals initiated by the umbrella committees in some cases resulted in creating new programs over the objection of the faculty, the Board held that the faculty’s managerial status was unaffected. *Id.* at 158-59, 161. The Board went on to explain:

An organization can have several levels of policy-making and, hence, several levels of managerial employees. There is, therefore, nothing inconsistent with the faculty members' having authority over one level of policy (*e.g.*, academics), and the administration (including the board of trustees), having control over another (*e.g.*, financial viability and long-term planning). The board of trustees and others in the administration are entrusted with the ultimate policy-making and fiduciary responsibility for the College, not the faculty. . . . Thus, there are college policy questions (*i.e.*, "financial resources," "general institutional goals," or "University-wide balance") that are broader than academic policy matters and from which the faculty members may be excluded yet they remain managerial employees. . . .

Id. at 162 nn. 33 & 36.

The Regional Director overlooked or misapplied the critical distinction in levels of managerial authority articulated by the Board in *Lewis & Clark*. The Regional Director's treatment here of the decision to seek university status is also belied by his effort to minimize the Point Park faculty's role in the discontinuance of programs. According to his findings, the discontinuance decisions were based on "low enrollment as opposed to any judgment that the educational mission of the institution as a whole would be enhanced by the discontinuance of selected programs" (RD at 23). Yet this lack of relation to academic matters is the exact reason why the Regional Director should have accorded little weight to Point Park's change to university status in the *Yeshiva* analysis.

Thus, while the Regional Director found that the faculty's involvement in the transition from college to university status was relatively limited (RD at 9-10), his decision tellingly does not reflect that the curriculum was altered or that the faculty committee structure was affected by the transition. Instead, the Regional Director makes unfounded references to the "academic consequences that flowed from the Administration's decision to seek university status" (RD at 10, 48). Absent any concrete evidence that the change to university status actually

had academic consequences, this change should be irrelevant to the ultimate issue of managerial standing.

The cases cited by the Regional Director to support his emphasis on the change to university status do not sustain this proposition. None of these cases deal with a change from college to university status. Rather, the Regional Director cites these cases for their treatment of restructuring more generally, and the cases are therefore inapposite.⁷ Furthermore, the Board notably minimized the importance of faculty authority over structural changes in its recent decision in *Carroll College, Inc.* 350 N.L.R.B. No. 30, at *2 (listing “structural changes” among those “nonacademic matters” that are “less significant in ascertaining managerial status”). The Regional Director’s misapplication of Board precedent with respect to restructuring decisions, coupled with his overemphasis on structural changes in other parts of his analysis, *see* Point III at n.5, *supra*, strongly suggests that his finding of non-managerial status should be reversed.

CONCLUSION

The *amici* organizations, broadly representative of the nation’s private colleges and universities, are deeply concerned by the Regional Director’s Supplemental Decision as threatening the continued vitality of the Supreme Court’s *Yeshiva* decision. We urge the Board

⁷ These cases also do not support the proposition that faculty authority over restructuring in general is determinative in the *Yeshiva* analysis. In *Lemoyne-Owen II*, 345 N.L.R.B. No. 93, at *3, for example, the Board, holding that the faculty was managerial, found that the faculty had rejected the provost’s proposed “collapsing” of the college’s divisions from five to three. There is no indication, however, that this finding was an important factor in the Board’s conclusion. In *St. Thomas University*, 298 N.L.R.B. 280, 286-87 (1990), the Board cited the administration’s unilateral adoption of a reorganization plan – which was extensive – simply as “additional evidence” of the faculty’s non-managerial status, having already considered the administration’s “predominant role in determining the University’s curriculum, grading policies, admission and matriculation standards, teaching methods, faculty hiring, and tenure.” Finally, in *Loretto Heights College*, 264 N.L.R.B. 1107 (1982), the Board did not discuss restructuring, let alone university status. The Regional Director here appears to cite *Loretto Heights* for the Board’s emphasis, in finding that the employees were not managerial, of the program directors’ pervasive authority relative to the faculty. *Id.* at 1107 n.2. Yet the Regional Director here did not compare the authority of the program directors in *Loretto Heights* with that of the Point Park administration, but instead merely noted an increase in the number of administrators employed by Point Park (RD at 10).

to grant Point Park's Request for Review, and, as directed by the Court of Appeals, to clearly identify the relative import of the factors relevant to managerial control that were considered in *Yeshiva* and subsequent cases. Moreover, the Board should reemphasize that a lack of faculty involvement in structural changes does not, in itself, deprive a faculty of managerial control with respect to academic matters. Applying those parameters to the instant case, and based on our understanding of the factual record, the *amici* further urge the Board to reverse the determination of the Regional Director and find the faculty of Point Park to be managers.

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Respectfully submitted,

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